FOR ARGUMENT

FEB 18 2003

No. 02-516

IN THE

Supreme Court of the United States

JENNIFER GRATZ, ET AL.,
Petitioners,
v.
LEE BOLLINGER, ET AL.,
Respondents.

On Writ of Certiorari to the United States District Court for the Eastern District of Michigan

BRIEF *AMICUS CURIAE* OF THE COLLEGE BOARD IN SUPPORT OF RESPONDENTS

NEIL LAWRENCE LANE
Vice President & General Counsel
LEZLI BASKERVILLE
Vice President for Government Relations
The College Board
45 Columbus Avenue
New York, NY 10023-6992
(212) 713-8283

JANET PITTERLE HOLT*
738 West Glebe Road
Alexandria, VA 22305
(703) 684-7700

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

25 pp

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. EDUCATIONAL JUDGMENTS OF ADMISSIONS PROFESSIONALS SHOULD BE ACCORDED DEFERENCE. 3

A. Admissions Criteria Cannot Be Divorced from the Institution's Own Mission. 4

B. In Higher Education There Can be No Universal Standard of Merit. 5

II. THE MOST RELIABLE ADMISSIONS DECISIONS ARE BASED ON MULTIPLE CRITERIA. 8

A. Reliance on any Single Metric Would Eliminate Qualified Candidates from Consideration. 8

B. Consideration of a Broad Set of Criteria Allows Colleges and Universities to Pursue Their Educational Missions. 12

III. THE EVIDENCE ON RACE-NEUTRAL ALTERNATIVES IS UNEVEN AND INCOMPLETE. 15

A. Class-Conscious Policies 16

B. Percent Plans 17

C. Outreach Programs 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) 6

Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) 10, 16

Keyishian v. Board of Regents of Univ. of N.Y., 385 U.S. 589 (1967) 3, 6

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 3, 6

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 3, 6

OTHER AUTHORITIES:

ACT, Inc., Ass'n for Institutional Research, the College Bd., Educ. Testing Serv., Nat'l Ass'n for College Admission Counseling, *Trends in College Admission 2000* (2002) 8

Am. Educ. Research Ass'n, Am. Psychological Ass'n, Nat'l Council on Measurement in Educ., *Standards of Psychological and Educational Testing* (1999) 8

Ass'n of American Univs., *On the Importance of Diversity in University Admissions* (Apr. 14, 1997) in *The New York Times*, Apr. 24, 1997 14

William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998) 4, 15

Brent Bridgeman, *et al.*, *Predictions of Freshman Grade-Point Average from the Revised and Recentered SAT I: Reasoning Test* (2000) 9

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

Nancy W. Burton & Leonard Ramist, *Predicting Success in College: SAT Studies of Classes Graduating Since 1980* (2001) 9

Wayne J. Camara and Amy Elizabeth Schmidt, *Group Differences in Standardized Testing and Social Stratification* (1999) 11, 12

Gerhard Casper, *Statement on Affirmative Action at Stanford Univ.* (Oct. 4, 1995) 4

The College Board, *2002 College-Bound Seniors* (2002) 11

The College Board, *Best Practices in Admissions Decisions* (2002) 5

The College Board, *College-Bound Seniors 1992 Profile* (1992) 11

The College Board, *College Board Program Handbook* (2002) 4, 9

The College Board, *Guidelines on the Uses of College Board Test Scores and Related Data* (2002) 9, 10

The College Board, *Outreach Program Handbook* (2001) 18

The College Board, *Reaching the Top: A Report of the National Task Force on Minority High Achievement* (1999) 19

Patricia Gandara & Julie Maxwell-Jolly, *Priming the Pump: Strategies for Increasing the Achievement of Underrepresented Minority Undergraduates* (1999) 16

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

Higher Educ. Presidential Ass'ns, *Statement on Affirmative Action Cases Before the United States Supreme Court* (2003) 15

Jerome Karabel, *No Alternative: The Effects of Color-Blind Admissions in California, in Chilling Admissions* (Gary Orfield & Edward Miller eds., 1998) 15, 16, 19

Michael T. Nettles, *et al.*, *Race and Testing in College Admissions, in Chilling Admissions* (Gary Orfield & Edward Miller eds., 1998) 7

Greg Perfetto, *et al., Toward a Taxonomy of the Admissions Decision-Making Process* (1999) 6

Gretchen W. Rigol, *Admissions Decision-Making Models* (2003) 5, 6, 8, 14

Jacques Steinberg, *The New Calculus of Diversity on Campus*, *The New York Times*, Feb. 2, 2003, Section 4, Page 3 17

The Expanding Racial Scoring Gap Between Black and White SAT Test Takers, J. of Blacks in Higher Educ. (Jan 23, 2003) 12

U.S. Comm'n on Civil Rights Office for Civil Rights, Staff Report, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (2002) 19

Warren W. Willingham & Hunter M. Breland, *Personal Qualities and College Admissions* (1982) 7

IN THE

Supreme Court of the United States

No. 02-516

JENNIFER GRATZ, *ET AL.*,
Petitioners,
v.
LEE BOLLINGER, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States District Court for the Eastern District of Michigan

---

BRIEF *AMICUS CURIAE* OF THE COLLEGE BOARD

All parties consent to the filing of this brief.[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae College Entrance Examination Board, commonly referred to as the College Board, is a national nonprofit membership organization dedicated to preparing, inspiring, and connecting students to college success and opportunity with a commitment to excellence and equity. Founded in 1900, the association comprises more than 4,300 schools, colleges, universities, and other educational

---

[1] No party or its counsel authored this brief in whole or in part nor made a monetary contribution to *amicus* for the preparation or submission of it.

organizations. Each year, the College Board serves over three million students and their parents, 23,000 high schools, and 3,500 colleges, through major programs and services in college admissions, guidance, assessment, financial aid, enrollment and teaching, and learning. Among its programs are the SAT®, the PSAT/NMSQT®, and the Advanced Placement Program® (AP®). At issue in this case is whether consideration of applicants' race and ethnicity in admissions decisions is appropriate, and whether adequate race-neutral alternatives are available. The College Board's perspective on these issues is based on expertise in the admissions field.

SUMMARY OF ARGUMENT

The college admissions process entails judgment by admissions professionals based on experience in the context of the particular institution's mission. For that reason, there can be no universal standard of merit for higher education. The models for admissions decision-making are as varied as the institutions themselves.

The College Board's experience in college admissions teaches that sound admissions decisions are based on multiple criteria. Neither the SAT, nor any other metric, should be the sole measure of merit. Overreliance on any single measure tends to exclude qualified applicants from admission to an institution. Consideration of multiple factors best enables the institutions to pursue their missions. For most colleges and universities, student body diversity is essential, because in the judgment of the institutions it enhances the educational experience for all students. Thus, a student who adds diversity may merit admission because the student helps advance the institution's goals.

Although petitioners argue that race-neutral alternatives can yield sufficient diversity, the evidence on these programs is uneven and incomplete. Research shows that class-conscious policies do not produce the diversity colleges and universities need. Percent plans do not address diversity in non-public institutions or in graduate and professional

programs and would have an attenuated impact in states where secondary schools are not racially identifiable. The College Board's experience shows that outreach partnerships are promising, but absent a sustained, well-financed effort, outreach partnerships alone cannot ensure that adequate numbers of underrepresented minority students would be admitted to selective colleges and universities. A national commitment to these programs, combined with race- and ethnicity-sensitive admissions, offers the best chance for higher education institutions to attain diversity.

ARGUMENT

I. EDUCATIONAL JUDGMENTS OF ADMISSIONS PROFESSIONALS SHOULD BE ACCORDED DEFERENCE.

Professional judgment and institutional experience inform college and university admissions. The institutions, which have designed and administered admissions plans over many years, are best positioned to make the sensitive judgments the admissions process requires. They employ admissions professionals who are experienced in selecting the students who bring the qualities that enhance the particular institution's life. These professionals understand the links among the institution's admissions policy, the institution's mission, and the capacity of the cohort admitted to respond well to the institution's academic program. Decisions by admissions professionals are worthy of deference.

Academic freedom, "a special concern of the First Amendment," protects such judgments. A college or university must have freedom "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 285, 312 (1978) (opinion of Powell, J.) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 236 (1957) (Frankfurter, J., concurring)); *accord*, *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). *See* Brief of Amici Curiae American Council on

Education and 53 other Higher Education Associations in Support of Respondents (discussing the latitude government historically has granted higher education institutions to conduct higher education).

A. Admissions Criteria Cannot Be Divorced from the Institution's Own Mission.

Because higher education institutions have distinct identities and missions, sound admissions decisions can be made only in the institutional context. There are several thousand higher education institutions in the United States. Some are large public universities, others small private colleges; some are highly specialized, others offer a liberal arts education; some are co-educational, some all-women's, some secular, some faith-based, some two-year, some four-year, some historically-black, some Hispanic-serving, and some tribal. Their missions and goals vary broadly. The College Board, *College Board Program Handbook* 2 (2002), *available at* http://www.collegeboard.com/highered/ra/sat/sat_resources.html.[2]

"To admit 'on the merits,' then, is to admit by following complex rules derived from the institution's own mission and based on its own experience of educating students with different talents and backgrounds * * * * Above all, merit must be defined in light of what educational institutions are trying to accomplish." William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 278 (1998). As a leading university's president wrote, "[t]he terms 'merit' and 'qualified' occasionally are used as if they were self-defining. Merit, however, ordinarily depends on many qualities of an individual and on judgments about how their combination might further the tasks of a university * * * *" Gerhard Casper, *Statement on Affirmative Action at Stanford*

[2] The College Board will provide to the Court copies of any publication cited in this brief that the Court indicates it would like to receive.

University (Oct. 4, 1995) (transcript available *at* http://www.stanford.edu/dept/pres-provost/president/speeches/951004affaction.html).

Assembling a new class of students is a weighty responsibility. A college or university admissions staff must thoroughly understand the institution, its mission, and its goals. Admissions officers interact with prospective students and their families, and are in close touch with the president, administrators, faculty, enrolled students, and alumni. Each admissions cycle, most invest hundreds of hours learning enough about applicants to make sound judgments about which of them will form an incoming class that is likely to enhance the institutional mission and the educational experience of all who enroll.

B. In Higher Education There Can be No Universal Standard of Merit.

No uniform, nationally agreed-upon definition of "merit" applies to college admissions. Many admissions models are successfully used. To better understand and explain variation among college admission approaches in the United States, the College Board in 1998 initiated the Admissions Models Project. The research demonstrated that no one model is appropriate for all institutions. Each institution must develop admissions practices that are based on its mission, goals, objectives, and priorities. *See* The College Board, *Best Practices in Admissions Decisions* 7, 31 (2002), *available at* http://www.collegeboard.com/html/pdf/BestPractAdmis.pdf. *See also* Gretchen W. Rigol, *Admissions Decision-Making Models* (forthcoming 2003) (manuscript at 51-54, available from the College Board).

A student considered among the best applicants at one institution can be unqualified for another. For example, a private liberal arts college may seek students who demonstrate intellectual curiosity, leadership, and a commitment to community service. A public university may operate under a state mandate to provide educational

opportunities to all students who have met certain requirements, such as completion of core courses in high school, specified grades, class rank, and standardized test results. An engineering college is likely to apply a different definition of merit than does a college of art and design.

How a college or university defines merit for admission heavily influences the type of institution it will be. To impose a single definition would be to deny institutions the freedom to pursue their missions. *See Bakke*, 438 U.S. at 312 (citing *Keyishian*, 385 U.S. at 603); *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring). *See also Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982); Greg Perfetto, *et al., Toward a Taxonomy of the Admissions Decision-Making Process* 5-7 (1999). For example, some institutions view higher education as an entitlement that should be available to all who are qualified. Others see it as a reward for the academically successful, the virtuous, the diligent or the public-spirited. Still others would have their institutions seek and nurture talent, to promote social and economic mobility. Yet other models hold that admissions decisions should advance goals of the nation or special institutional needs.

Colleges and universities often do not limit themselves to any one such model, but instead employ several simultaneously or sequentially. Review of their published admissions materials reveals that many institutions explicitly inform prospective applicants that they seek students in a number of the categories identified above, or others. Many such statements emphasize interest in enrolling students who have demonstrated academic strengths, as well as those who evidence potential both to benefit from and contribute to the campus community. Most such statements also note an interest in enrolling a student body with diverse backgrounds, talents, skills, and interests. *See* Rigol, *supra*, at 7, 57-59.

In assessing academic qualifications, many institutions consider numerical or quantitative criteria, such as the

number of courses taken, high school grade-point-average, rank in class, and standardized test results. Academic criteria of a more qualitative nature are also often employed, such as strength of the curriculum, intellectual curiosity, ability to undertake independent study, and communication skills. Likewise, different kinds of criteria are often used to assess non-academic attributes—nominal attributes, such as geographic, racial or ethnic origin, or parents' occupations, and somewhat less readily gauged attributes, such as leadership, creativity, commitment, and special talents. These less readily gauged considerations can require close review of the application by an experienced admissions officer. Admissions professionals know that "grade-point averages and test scores measure only certain kinds of achievement and potential, and that broader criteria are equally, and sometimes more, valid as indicators of students' potential." Michael T. Nettles, *et al.*, *Race and Testing in College Admissions, in Chilling Admissions* (Gary Orfield & Edward Miller eds. 1998).

While persons unfamiliar with them sometimes categorize admissions criteria as either objective or subjective, the distinction is rarely clear. For example, grades, which may appear to be objective, generally embody teachers' subjective evaluation of the student's performance. Classroom performance encompasses factors such as participation, growth, and attentiveness, as well as mastery of subject matter and quality of work. While academic standards are the most important factor in most admissions decisions, other factors have become increasingly important at many institutions. A major research study conducted for the College Board suggests that personal qualities, particularly those that reflect productivity and follow-through, are highly pertinent to sound admissions decisions. *See* Warren W. Willingham & Hunter M. Breland, *Personal Qualities and College Admissions* 6-7, 170-173 (1982). Thus, private as well as public institutions value such attributes as leadership, participation in extracurricular activities, community

activities, motivation, and initiative. ACT, Inc., Ass'n for Institutional Research, the College Bd., Educ. Testing Serv., Nat'l Ass'n for College Admission Counseling, *Trends in College Admissions 2000*, 74 (2002).

Colleges and universities also evaluate applicants in the context of opportunities and disadvantages encountered. For example, students who attend a high school at which honors or Advanced Placement offerings are limited are often not penalized for having taken few advanced courses. Non-academic achievements often are also evaluated in context. Many institutions invite students to submit additional material that describes extenuating circumstances or unusual situations of which the admissions office should be aware. Thus, often a student who works or takes care of younger siblings is not expected to participate in extracurricular activities to the same extent as are students who don't. Rigol, *supra*, at 20. Admissions professionals recognize that human performance is influenced by context and that the college admissions process cannot be reduced to a rigid formula.

II. THE MOST RELIABLE ADMISSIONS DECISIONS ARE BASED ON MULTIPLE CRITERIA.

A. Reliance on any Single Metric Would Eliminate Qualified Candidates from Consideration.

Petitioners and their *amici* assume that a student with higher SAT or other admission test scores is, *ipso facto*, better qualified. They would require educational institutions to show that a higher-scoring unsuccessful applicant was not subjected to discrimination. Based on its long experience, the College Board knows that standardized test scores should not be the sole criterion for determining merit for admission. Overreliance on test scores, or on any other single measure, is strongly discouraged by test developers, test users, professional organizations, and research findings. *See generally* Am. Educ. Research Ass'n, Am. Psychological Ass'n, Nat'l Council on Measurement in Educ., *Standards of Psychological and Educational Testing* (1999).

The College Board knows well the benefits and limitations of standardized admissions tests. Having a common yardstick by which to assess students' preparedness for college success can be quite useful to admissions professionals; the value of SAT scores as a predictor of college grades should not be discounted. *College Board Program Handbook*, *supra*, at 13. With more than 27,000 United States secondary schools that have vastly different fiscal and human resources, teaching models, and grading systems, standardized test scores can assist admissions personnel to understand and interpret students' qualifications and preparedness. *See* The College Board, *Guidelines on the Uses of College Board Test Scores and Related Data* 2 (2002), *available at* http://www.collegeboard.com/prod_downloads/research/RDGuideUseCBTest020729.pdf.

The predictive value of the SAT for college success has been widely studied. Data collected by the College Board and others have consistently found that SAT scores work well as a predictor of college grades, *College Board Program Handbook* at 13; *see also, e.g.*, Brent Bridgeman, *et al.*, *Predictions of Freshman Grade-Point Average from the Revised and Recentered SAT I: Reasoning Test* (2000), including both early and later college performance, as well as of retention and graduation. Nancy W. Burton and Leonard Ramist, *Predicting Success in College: SAT Studies of Classes Graduating Since 1980* (2001).

But the SAT is not intended to be and cannot soundly be the sole measure of merit for admissions. The *Guidelines on the Use of College Board Test Scores and Related Data* encourage admissions professionals to use standardized test scores "in conjunction with other indicators, such as secondary school record (grades and courses), interviews, personal statements, writing samples, portfolios, recommendations, etc., in evaluating the applicant's admissibility at a particular institution." *See Guidelines, supra*, at 9, 10. The *Guidelines* further indicate that

admissions test scores should be viewed "as contemporary and approximate indicators rather than as fixed and exact measures of a student's preparation for college-level work." *Id.* at 9.

Overreliance on standardized test scores can have the unintended effect of excluding qualified, meritorious applicants. In this case, reliance solely on test scores by the University of Michigan would have led to rejection of a number of qualified minority applicants. "This is due to the fact that nationally, minorities are very underrepresented at the higher level of standardized test scores, and over-represented at the lower level." *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 830 (E.D. Mich. 2000).

It is well documented that average standardized test scores of students from underrepresented minority groups are lower than national averages. The College Board for many years has published reports that show average SAT scores by racial/ethnic group, including for high school graduates who took the SAT in 2002. Although there has been a gradual increase in average scores, particularly in math, for most groups during the past decade, persistent gaps remain between underrepresented minorities and white test-takers—203 points for African Americans, 157 for Mexican Americans, 154 for Puerto Ricans, and 98 for Native Americans. *See generally* The College Board, *College-Bound Seniors 1992 Profile;* The College Board, *2002 College-Bound Seniors, both available at* http://www.collegeboard.com/press/article/0,,11752,00.html.

Pertinent demographic characteristics of underrepresented minority SAT-takers also differ from those of whites. For example, the highest level of education of parents of 52 percent of African American students and 69 percent of Mexican American students was a high school diploma (or less). By contrast, only 31 percent of white students had parents in that category. Broad differences are also evident at the other end of the education spectrum, with only 14

percent of African American students and 10 percent of Mexican American students reporting a parental graduate degree, compared to 28 percent of white students.

Information on family income shows similar pertinent differences. Only 15 percent of both African American and Mexican American students reported annual family income over $70,000, compared to 48 percent of white students. There is also a major difference between Mexican American and white students in terms of language background, with 39 percent of Mexican American students reporting that English was their first language learned, compared to 95 percent of white students.

Average SAT scores reflect such differences. The types of abilities and skills the SAT measures are developed in and out of school. Students whose parents have less education are likely to be exposed to fewer books in the home; students whose families have lower incomes are more likely to enroll in schools that have fewer resources and fewer advanced offerings.

Similar gaps are evident in other admissions tests, such as the ACT, Graduate Record Examinations, Graduate Management Admissions Test, Law School Admissions Test, and Medical College Admissions Test, as well as other standardized measures, such as the National Assessment of Educational Progress. "[G]roup differences appear fairly consistent across standardized admissions tests, with the largest gaps between white and African-American test-takers, followed by Hispanic test-takers." Wayne J. Camara and Amy Elizabeth Schmidt, *Group Differences in Standardized Testing and Social Stratification* 1 (1999). College Board data suggest that differences in a great many factors may explain the persistence of these gaps, including "family income, class rank, access to rigorous and advanced courses, segregated surroundings, white teacher, counselor and administrator low expectations of African American and Latino students, and what [researcher] Claude Steele calls

'stereotype vulnerability.' " *The Expanding Racial Scoring Gap Between Black and White SAT Test Takers*, J. of Blacks in Higher Educ. (Jan. 23, 2003).

Many of the factors that contribute to differences in SAT scores are reflected in differences in high school grades. As former College Board president Donald M. Stewart has noted, the "stark differences * * * illustrate the inequities minorities have suffered, through inadequate academic preparation, poverty, and discrimination; years of tracking into dead-end educational programs; lack of advanced and rigorous courses in inner-city schools, or lack of access to such programs when available; threadbare facilities and overcrowding; teachers in critical need of professional development; less family support and experience in higher education; and low expectations." Camara and Schmidt, *supra*, at 13.

A great many students with lower test scores or high school grade-point-averages succeed in college. In the admissions process, institutions make case-by-case judgments, based on experience and institutional retention and graduation data, about whether a student has potential to overcome deficits in preparation. Admissions officers know that many highly motivated students, even if academically less well prepared, can be successful students.

B. Consideration of a Broad Set of Criteria Allows Colleges and Universities to Pursue Their Educational Missions.

While merit can be defined only in the context of each institution, certain common groupings of factors are considered by many institutions. These include, for example:

- Academic Achievement, Quality, and Potential
  - Direct measures (*e.g.*, AP courses taken, class rank, test scores)
  - Caliber of high school
  - Evaluative measures

- Non-academic characteristics and attributes
  - Geographic
  - Personal background
  - Extra-curricular activities, service, and leadership
  - Personal attributes
  - Extenuating circumstances

Within each of these groupings, specific qualities on which the student may be evaluated are often included. For example, academic evaluative measures often include:

- Academic recognition and awards
- Artistic talent
- Depth in one or more academic areas related to student interests
- Evidence of academic passion
- Grasp of world events
- Independent academic research
- Intellectual curiosity
- Sophisticated vocabulary and command of the English language
- Writing quality

Personal background characteristics often include, for example:

- Alumni connection
- Cultural diversity
- Faculty/staff connection
- First generation to go to college from family
- Low economic family background
- Military veteran
- Peace Corps, Americorps, etc.

- Personal disadvantage
- Returning student
- Gender

See Rigol, *supra*, at 19, 75-77.

Admissions officers strive, with an extraordinary record of success, to consider such factors in a manner that is fair, reasonable and based on individual merit, not arbitrary, stigmatizing or quota-driven.

None of the foregoing criteria, separately or collectively, have proven to be effective substitutes for consideration of race and ethnicity when an institution seeks a racially and ethnically diverse student body. Virtually all colleges and universities seek a student body with diverse backgrounds and experiences, because they believe student body diversity vital to education. In 1997, 62 major research universities, including eight Ivy League institutions and over 30 public institutions, issued a statement "reaffirm[ing] [their] * * * strong conviction concerning the continuing need to take into account a wide range of considerations—including ethnicity, race, and gender—as [they] * * * evaluate the students whom [they] * * * select for admission." Association of American Universities, *On the Importance of Diversity in University Admissions* (Apr. 14, 1997) in *The New York Times*, Apr. 24, 1997, at A27. The broad support for consideration of many factors, including race and ethnicity, in determining merit was recently affirmed in a statement signed by the heads of the nation's major higher education associations, representing public, private, land-grant, faith-based, and secular colleges and universities; historically white, historically black, and Hispanic-serving institutions; independent, co-ed and women's institutions; large and small, two-year, and four-year institutions. The statement emphasized

> the importance of educating Americans of all backgrounds. We believe there is a national imperative to ensure that Americans who represent the diversity of races, ethnic groups, religious beliefs, and economic circumstances participate in higher education at all levels, including graduate and professional schools.

Statement of Higher Education Presidential Associations on Affirmative Action Cases Before the United States Supreme Court (Jan. 24, 2003).

Because an institution's mission shapes its definition of merit, and therefore its admissions decisions, the concept of diversity is fully consistent with the concept of merit. For many institutions, the applicant's ability to bring diversity to the institution is an element of merit, as are other attributes that advance the institution's mission and goals. Colleges and universities are not simply means of transmitting knowledge. They seek to cultivate students' intellectual, moral and social growth; and they have a responsibility to the nation to make higher education broadly accessible to its citizens. "[R]ace is relevant in determining which candidates 'merit' admission because taking account of race helps institutions achieve three objectives central to their mission—identifying individuals of high potential, permitting students to benefit educationally from diversity on campus, and addressing long-term societal needs." Bowen & Bok, *supra*, at 278. And research shows that consideration of the factors identified above cannot itself produce the racial and ethnic diversity that colleges and universities need. *See* Jerome Karabel, *No Alternative: The Effects of Color Blind Admissions in California, in Chilling Admissions*, *supra*, at 32.

III. THE EVIDENCE ON RACE-NEUTRAL ALTERNATIVES IS UNEVEN AND INCOMPLETE.

Petitioners and their *amici* contend that "race-neutral" alternatives would yield sufficient diversity at the University of Michigan. The district court, after extensive review of alternatives—total reliance on test scores, income-based

strategies, and vigorous minority recruitment efforts—concluded that none would yield more than a token number of underrepresented minority students. *See Gratz*, 122 F. Supp. 2d at 830. The court was correct.

As to jurisdictions where race- and ethnicity-conscious diversity plans in higher education admissions have been barred, we are only now beginning to gather evidence on the efficacy of such purportedly race-neutral alternatives as grade-point-averages, class-conscious policies, percent plans, and outreach policies. To date, none has demonstrated sustained results that are consistent or successful across the pertinent demographics.

A. Class-Conscious Policies

Some colleges and universities have opted to use socioeconomic status as an alternative to race and ethnicity. Research shows that such "[c]lass-conscious policies" do not "produce campuses with anything near the levels of racial and ethnic diversity attained by the nation's leading undergraduate institutions and professional schools in recent decades. [Ethno]-racial differences simply are not reducible to class differences just as class differences are not reducible to racial ones." Jerome Karabel, *No Alternative: The Effects of Color-Blind Admissions in California, in Chilling Admissions*, *supra,* at 34. Ethnicity, race, and class are separate sources of disadvantage in the United States. "Many participants in this debate, however, warned that this strategy would likely result in lower numbers of African American, Latino, and Native American admittees because many of these students with aspirations to attend four-year colleges are, in fact, middle class * * * * Middle-class students of color may well be the best prepared minority students * * * to persist in competitive college environments." Patricia Gandara with Julie Maxwell-Jolly, *Priming the Pump: Strategies for Increasing the Achievement of Underrepresented Minority Undergraduates* 20 (1999).

B. Percent Plans

Under the so-called "percent plans," admission is guaranteed at state-funded higher education institutions to a fixed percentage of graduates at each high school in the state. All students above a designated class rank, regardless of the characteristics of the school or the rigor of its curriculum, are eligible for admission.

A flaw characterizes implementation of percent plans. These apparently race- and ethnicity-neutral alternatives to affirmative action tend, paradoxically, to be race- and ethnicity-influenced to a very considerable extent. They appear to yield a diverse admissions pool if there is a sufficient number of racially and ethnically identifiable schools in the state to raise the number of underrepresented minorities in the top-percentages applicant pool. In those instances in which the school systems are racially and ethnically diverse, the top performers, both in terms of grade-point-averages and test scores, tend to be white and Asian students. *College Bound Seniors 1992 Profile, supra*; *2002 College-Bound Seniors, supra*. *See* Jacques Steinberg, *The New Calculus of Diversity on Campus*, *The New York Times,* Feb. 2, 2003, sect. 4, at 3.

Regional differences, too, characterize racial and ethnic representation in the top ranks of high school classes. For example, among SAT takers in the class of 2002 from New England states, 36 percent of Asian American and 29 percent of white students reported they were in the top 20 percent of their classes, compared with 21 percent of Hispanic students and 19 percent of African American students. In Southern states, 38 percent of Asian American students and 37 percent of white students reported they were in the top 20 percent of their classes, compared with 24 percent of African American

and 26 percent of Hispanic students.[3] For these reasons, percent plans would not be effective in many states.

C. Outreach Programs

The goal of outreach initiatives is to provide all students with more opportunities to prepare for and succeed in college. Such programs provide multi-tiered systems of training and support to prepare students—especially those from high-priority middle and high schools—to be successful in advanced coursework taught by qualified teachers, and to gain admittance to and achieve success in college.

In 1999 and 2000, the College Board collected data on more than one thousand of the nation's early outreach programs, through the National Survey of Outreach Programs. The survey was designed to assist practitioners, policymakers, researchers, and philanthropists to better understand programs designed to help historically underrepresented students gain the prerequisite college success skills and aspiration to succeed in college. *See generally* The College Board, *Outreach Program Handbook* (2001). The data were collected on programs in all 50 states, the District of Columbia, Puerto Rico, Guam, and Micronesia. Data were gathered on programs that emanated from colleges and universities, philanthropists, the community, and school systems. Such programs entail a wide array of services for students, 69 percent of whom are non-white and 71 percent of whom are first-generation Americans. The services provide tutoring, mentoring, test-taking and study skills development, financial planning, and a range of other efforts designed to promote college awareness, college aspirations, attendance, and persistence. *Id.* at xv-xvi.

The College Board has extensive experience working with the states and local governments in early outreach partnerships aimed at increasing the pool of underrepresented

---

[3] These findings are based on College Board data that are unpublished but available to the public, and the Court, on request.

students who possess college success skills. Although these programs are having a positive impact on the numbers of students who successfully complete college-prep and college level coursework in high school, the programs are by definition long-term and do not offer an immediate solution. Analysis of the programs shows that broadening the pipeline of qualified minority applicants is laborious and slow, has not yet eliminated the need for admissions policies that take into account race and ethnicity, and is unlikely to do so for some time to come. *See, e.g.,* United States Commission on Civil Rights Office for Civil Rights, Staff Report, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (2002); Karabel, *supra,* at 39-40.

Most Americans see college as a gateway to the greater rewards of life in a democratic society. Unfortunately, many members of traditionally underserved populations do not receive the appropriate preparation to enable development of skills needed for college and further opportunity. In 1999, the College Board's National Task Force on Minority High Achievement issued a report, a key recommendation of which focused on early preparation of minority students through programs such as the College Board's outreach partnership model. The College Board, *Reaching the Top: A Report of the National Task Force on Minority High Achievement* 1 (1999). Florida, for example, has adopted and made a substantial commitment to such an effort. Many states and school districts are moving towards replication of outreach partnership models, as they come to recognize such models' value in raising standards and achievement for all students—especially underrepresented minority students in grades 6-12. However, most have yet to commit the time, effort, and financial resources that such programs require.

Absent a broad, sustained, amply-funded national effort, such programs alone cannot ensure that adequate numbers of underrepresented minority students would be admitted to selective colleges and universities were consideration of race

and ethnicity barred. Until the time when there is broad access both to high quality secondary education and programs that allow students to develop needed skills, a segment of the student population will struggle to demonstrate the potential for success in higher education. A national commitment to outreach measures and to affirmative action programs by higher education institutions offers the best available opportunity for the institutions to serve their educational missions.

CONCLUSION

For the foregoing reasons, the district court judgment should be affirmed.

Respectfully submitted,

NEIL LAWRENCE LANE
Vice President & General Counsel
LEZLI BASKERVILLE
Vice President for Government Relations
The College Board
45 Columbus Avenue
New York, NY 10023-6992
(212) 713-8283

JANET PITTERLE HOLT*
738 West Glebe Road
Alexandria, VA 22305
(703) 684-7700

* Counsel of Record

Counsel for Amicus Curiae